2009 BCSECCOM 595

Manna Trading Corp Ltd., Manna Humanitarian Foundation,
Legacy Capital Inc. and Legacy Trust Inc.
Hal (Mick) Allan McLeod, David John Vaughan,
Kenneth Robert McMordie also known as Byrun Fox,
Dianne Sharon Rosiek, Robert (Robb) Murray Perkinson

***Securities Act*, RSBC 1996, c. 418**

Hearing

Panel	Brent W. Aitken	Vice Chair
	David J. Smith	Commissioner
	Shelley C. Williams	Commissioner
Submissions completed	September 22, 2009	
Date of Decision	October 22, 2009	
Submissions filed by		
Douglas B. Muir Graham R. MacLennan	For the Executive Director	
Dianne Sharon Rosiek	For herself	

Decision

I Introduction

¶ 1 This is the sanctions portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418. Our Findings on liability, made on August 4, 2009 (see 2009 BCSECCOM 426), are part of this decision.

¶ 2 The executive director and the respondent Diane Sharon Rosiek filed submissions. We made no findings against Robert (Robb) Murray Perkinson. References to the respondents in this decision do not include Perkinson.

II Background

A Summary

¶ 3 Manna was a fraud invented and implemented by the respondents into which more than 800 investors deposited about US$16 million. They received as little as US$3 million, and no more than US$5.6 million, back. There is no apparent hope of recovering the rest.

¶ 4 Hal (Mick) Allan McLeod created the Manna scheme and, with David John Vaughan's assistance, expanded it. The expansion became more aggressive when Kenneth Robert McMordie, who used the name Byrun Fox, and Rosiek joined the scheme later.

¶ 5 The Manna scheme's form changed in minor ways and used various entities to perpetrate the fraud: Manna Trading Corp Ltd., the Manna Humanitarian Foundation, and the two Legacy entities, Legacy Capital Inc., and Legacy Trust Inc. All of these entities (which we refer to collectively as "Manna") were in reality a single sham investment scheme which, in this decision, we refer to as the Manna scheme.

¶ 6 Manna induced investors to loan it money and told them that their funds would be placed with experienced traders who had a long history of producing double-digit monthly returns through foreign currency trading. Manna told investors that it had "an annualized trading history of profit returns not less than 20% per month (240% per year)," and that Manna's profits enabled it to pay consistently high rates of return. Manna said it had historically paid returns to investors of 125.22% per year. Manna portrayed the investments as low-risk. It said the investments were "safe" and "secure" and that Manna was "continually mindful of capital preservation."

¶ 7 Manna promised investors 7% monthly returns (later reduced to 5%), sometimes compounded. (A 7% monthly compounded return works out to 125.22% per year.) Investors who became "affiliates" or "consultants" could bring in new investors. When they did so, they earned a commission on the amount invested and a continuing share of the return on the new investment.

¶ 8 Some investors invested through a "private common law spiritual trust." The trust was a mechanism Fox concocted ostensibly to avoid the application of tax and securities laws to investments in the Manna scheme.

¶ 9 All of these statements were misrepresentations. There is no evidence that Manna placed investors' funds with foreign currency traders, or that the investors' funds earned returns from any other source. Manna had no trading profits. No Manna investor experienced the historical returns Manna said investors did. Manna had no source of revenue other than investor contributions. The trust structure was a sham.

¶ 10 Manna also told investors that some of the returns Manna earned from its foreign exchange trading profits would be used for humanitarian causes. There is no evidence that any Manna funds went to humanitarian causes.

¶ 11 The reality is that Manna was a Ponzi scheme. Manna fraudulently used the investments of later investors to fund the promised returns to earlier investors, to pay commissions to the affiliates and consultants, to invest in an online gaming business, and to buy real estate in Costa Rica.

¶ 12 McLeod, Vaughan, Fox and Rosiek fraudulently used investors' funds to enrich themselves.

¶ 13 This was a deliberate and well-organized fraud that resulted in the loss of at least US$10.4 million, and probably closer to US$13 million, by more than 800 investors in British Columbia and elsewhere.

B Findings

¶ 14 We found that McLeod, Vaughan, Fox, Rosiek, Manna Trading, Manna Foundation, Legacy Capital, and Legacy Trust:

1. traded in securities without being registered to do so, contrary to section 34(1) of the Act, and distributed those securities without filing a prospectus, contrary to section 61(1);

2. made misrepresentations, contrary to section 50(1)(d), when they lied to investors about how their money would be invested, the returns offered, and the risk associated with the Manna scheme; and

3. perpetrated a fraud, contrary to sections 57(b) and 57.1(b), when they lied to the investors, inducing them to invest in the Manna securities.

III Discussion and analysis

¶ 15 The executive director seeks the following orders:

1. Permanent orders under section 161(1) of the Act against McLeod, Vaughan, Fox and Rosiek, denying each of them the use of the exemptions under the Act and prohibiting each of them from
   - trading,
   - being a director or officer of any issuer, registrant or investment fund manager,
   - acting as a registrant, investment fund manager, or promoter,
   - acting in a management or consultative capacity in connection with activities in the securities market, and
   - engaging in investor relations activities.

2. Orders under section 161(1)(g) against McLeod, Vaughan, Fox and Rosiek that each of them disgorge the amounts obtained through the fraud.

3. Orders under section 162 imposing an administrative penalty of $6 million against each of McLeod, Vaughan, Fox and Rosiek.

4. Permanent orders under section 161(1) against Manna Trading, Manna Foundation, Legacy Capital, and Legacy Trust, denying each of them the use of the exemptions under the Act and prohibiting each of them from
   - trading,
   - acting as a registrant, investment fund manager, or promoter,
   - acting in a management or consultative capacity in connection with activities in the securities market, and
   - engaging in investor relations activities.

5. Orders under section 161(1)(g) against Manna Trading, Manna Foundation, Legacy Capital, and Legacy Trust that each of them disgorge the amounts obtained through the fraud.

6. Orders under section 162 imposing an administrative penalty of $6 million against each of Manna Trading, Manna Foundation, Legacy Capital, and Legacy Trust.

A Factors to consider

¶ 16 In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission discussed the factors relevant to sanction as follows (at page 24):

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,

- the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
- the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
- orders made by the Commission in similar circumstances in the past.

¶ 17 The respondents contravened section 57(b) and 57.1(b) by perpetrating a fraud on the Manna investors. In doing so, they contravened sections 34(1) and 61(1) and more importantly, section 50(1)(d), by making misrepresentations to investors. These misrepresentations were central to the respondents' success in perpetrating and concealing the fraud.

¶ 18 Nothing strikes more viciously at the integrity of our capital markets than fraud, and this case represents a particularly aggressive and flagrant assault on the public's confidence in our markets. We have characterized the respondents' fraud as deliberate and well organized. The respondents built their fraud on a foundation of blatant but carefully constructed lies, which they delivered consistently through an elaborate training program. Their lies about Manna's business and its promised returns induced prospects to invest and stay invested. They exploited prospects' charitable tendencies by telling them that part of Manna's profits went to humanitarian causes, when Manna did no such thing. This was an important factor in many investors' decision to invest.

¶ 19 The respondents produced false account statements, showing returns that did not exist. They created a multi-level marketing structure to maximize distribution of the Manna securities.

¶ 20 The respondents knew exactly what they were doing when it came to dealing with securities laws. They were well aware of the requirements of the Act, and of the role of the Commission in enforcing the Act. They took numerous actions calculated to escape detection. They attempted, unsuccessfully, to construct the Manna scheme in a form that would fit within a specific exemption in the Act.

¶ 21 The emphasis on secrecy worked well for the respondents. Because of the non-disclosure agreements investors signed, they were intimidated from seeking

advice about investing in the Manna scheme. Because of those agreements, and because of false but intimidating statements made to them by the respondents, many investors refused or were reluctant to cooperate with the Commission's investigation.

¶ 22 The respondents took other actions to avoid detection. They received and disbursed funds in cash. They limited the size of bank drafts to avoid the application of money laundering reporting requirements. They frequently switched banks. They set up debit cards and other payment mechanisms to avoid detection and the creation of a paper trail.

¶ 23 Our Findings detail each of the respondents' roles in the scheme, how all of them participated in the serious misconduct described above, and how they profited from it. Through all of this serious misconduct, the respondents significantly harmed investors, as we described in the Findings, and damaged the integrity of British Columbia's capital markets.

¶ 24 There are no mitigating circumstances.

¶ 25 McLeod was president and a director of First Capital Trading & Financing Corp. and a director of First Capital Credit Corp. In 2003 the British Columbia Superintendent of Financial Institutions found that these companies, and a third with whom McLeod was associated, had contravened the *Financial Institutions Act*, RSBC 1996, c. 141, and ordered them to cease carrying on a trust or deposit business. According to the Superintendent's order, the companies took and kept funds from the public, and engaged in conduct that was deceptive and misleading.

¶ 26 Vaughan was disciplined by this Commission for engaging in an illegal distribution that had many features in common with the Manna scheme. Orders against him from that misconduct remain in force today.

¶ 27 The respondents' conduct shows that they are a risk to investors and our capital markets, and that they are not fit to participate in our capital markets.

B Orders in the public interest

¶ 28 This case calls for orders that are protective of our markets and preventative of likely future harm. One of the best ways to do this is to ensure that the orders we make communicate strong specific and general deterrence.

Orders under section 161(1)

¶ 29 The respondents' misconduct occurred between January 2005 and June 2007.

¶ 30 Section 161(1) was amended on November 22, 2007, after the respondents' misconduct occurred and after the executive director issued the notice of hearing (on June 20, 2006).

¶ 31 The amendments added to section 161(1)(d) powers to make orders prohibiting a person from acting

- as a director or officer of a registrant or investment fund manager,
- as a registrant, investment fund manager or promoter, and
- in a management or consultative capacity in connection with activities in the securities market.

¶ 32 Section 161(1) was also amended by adding paragraph (g), which gives the Commission the power to require persons to disgorge any amount obtained by contravening the Act.

¶ 33 There is a presumption against the retrospective operation of statutes. In *Thow v. British Columbia (Securities Commission)* 2009 BCCA 46, the Court of Appeal considered the issue of retrospectivity in the context of securities legislation and concluded that the presumption against the retrospective operation of provisions such as sections 161(1)(b) and (d) is rebutted because they are in the nature of "statutory disqualifications" which serve a "prophylactic purpose." In our opinion, the new prohibitions added to section 161(1)(d) are of the same nature and we are free to apply them if appropriate.

¶ 34 Section 161(1)(g) was not directly addressed by the court in *Thow*, but in stating the exception to the presumption against retrospectivity for orders that serve a prophylactic purpose, the court said (at para. 46):

> "The exception does, however, appear to be applicable only where a prejudicial sanction is imposed, not for penal purposes, but as a prophylactic measure to protect society against future wrongdoing by that person. While the imposition of such sanctions may, incidentally, inflict hardship on the wrongdoer, the infliction of such hardship is not the goal."

¶ 35 In *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 the Supreme Court of Canada held that disgorgement orders serve a prophylactic purpose, noting that "the objective is to preclude the fiduciary from being swayed by considerations of personal interest." The court goes on to say that such orders "teaches faithless fiduciaries that conflicts do not pay. The prophylactic purpose thereby advances the policy of equity . . . "

¶ 36 Although *Strother* is about civil disgorgement orders against fiduciaries, the reasoning, in our opinion, applies equally well to administrative disgorgement orders under section 161(1)(g). Those orders serve to deter persons from illegal activity by removing the incentive of profiting from illegal misconduct. Section 161(1)(g) does not have punishment as its objective. It removes from contravening parties money not rightfully theirs, thus advancing the policy of ensuring that those who contravene securities laws do not profit from their misconduct, and that money obtained by contravening the Act is returned.

¶ 37 We conclude that we are free to make orders under sections 161(1)(d) and (g) as they now read, if appropriate. Would it be unfair to do so in the context of this hearing?

¶ 38 The amendments to section 161(1) came into force after the respondents' misconduct had occurred, and after the executive director issued the notice of hearing. However, they came into force about seven months before the executive director issued the amended notice of hearing on June 27, 2008, and about 13 months before the hearing started. The respondents had ample notice of the potential orders that could be made against them. In these circumstances, it would not be unfair to apply section 161(1) as amended.

¶ 39 The respondents' conduct is well over the threshold where permanent bans from our markets are appropriate. Their conduct also demands that the public be protected by ensuring those bans be as broad as possible. We are making the appropriate orders under sections 161(1)(b) and (d).

¶ 40 The respondents also obtained funds through their contravention of the Act. We are therefore making appropriate orders under section 161(1)(g).

¶ 41 Section 161(1)(g) says:

> 161(1) If the commission . . . considers it to be in the public interest, [it] may order . . .
>
> (g) if a person has not complied with this Act . . . that the person pay to the commission any amount obtained . . . directly or indirectly, as a result of the contravention . . . .

¶ 42 In our Findings, we noted the challenge in accounting for all of the US$16 million that Manna fraudulently took from investors. Manna kept no proper records or accounts, it used bank accounts in the names of other entities, it conducted much of its business in cash, and many relevant records are located offshore. Although Commission staff could trace about 80% of investor funds through numerous bank

accounts in British Columbia and Costa Rica, they could trace only 58% to identified recipients. Even when a recipient was identified, the reason for the payment or its ultimate destination was often unclear.

¶ 43 That said, it is not necessary, in making orders under section 161(1)(g), to trace investor funds into the hands of the respondents. We have found that the individual respondents committed a large-scale, deliberate, and well-organized fraud in contravention of the Act. They obtained US$16 million as a result of the contravention. None of that money was used in the manner they told investors it would be used.

¶ 44 Each respondent contravened the Act. We described the role of each of the individual respondents in the Findings. Each of their individual contraventions, directly or indirectly, resulted in the investment of US$16 million in the Manna scheme. Under section 161(1)(g), we may order each of them to pay to the Commission that amount: it is the amount obtained, directly or indirectly, as a result of their individual contraventions of the Act.

Orders under section 162

¶ 45 Section 162 was also amended after the respondents began contravening the Act. On May 18, 2006 section 162 was amended to increase the maximum administrative penalty the Commission can order from $250,000 to $1 million per contravention.

¶ 46 The respondents perpetrated significant and repeated contraventions of the Act after the amendment came into force. After May 18, 2006, the respondents raised over US$10 million in contravention of sections 34(1) and 61(1), made misrepresentations in contravention of section 50(1)(d), and committed fraudulent acts in contravention of sections 57(b) and 57.1(b).

¶ 47 All of these contraventions after May 18, 2006 were a continuation of the same fraudulent Manna scheme that was underway, and the same pattern of blatant contraventions by the respondents of sections 34(1), 61(1), 50(1)(d), 57(b), and 57.1(b), since at least January 2005. Because the amendment to section 162 came into force during the respondents' continuous and repeated contraventions of the Act, there is no issue of retrospectivity. We can apply section 162 as it now reads.

¶ 48 Neither is there any issue of fairness – the notice of hearing was issued a little over a month after the amendments came into force.

¶ 49 Section 162 allows us to order payment of the maximum administrative penalty for each contravention. We found that each of the respondents contravened four sections of the Act (treating the two fraud sections, 57(b) and 57.1(b) as one). The

respondents contravened all of those sections in their dealings with hundreds of clients. They also contravened those sections multiple times in their dealings with many clients. There are therefore hundreds, if not thousands, of contraventions for which we could order an administrative penalty.

¶ 50 Rather than deal with each of the respondents' contraventions separately, we have considered their conduct globally, and are making orders under section 162 that impose an administrative penalty for all of their respective contraventions.

¶ 51 In amending section 162, the Legislature quadrupled the maximum penalty and authorized the maximum to be applied "per contravention". It seems clear that the Legislature's intent was that the Commission have the power to impose significant administrative penalties in the public interest where appropriate in the circumstances.

¶ 52 In *Thow* 2007 BCSECCOM 758 the Commission first applied the new maximum penalty in section 162. It said, "We anticipate future panels will apply section 162 in varying ways, depending on what is appropriate in the circumstances of the cases before them." This is appropriate. With the power to order administrative penalties at the rate of $1 million per contravention, each panel will have to consider carefully the circumstances of the case before it and make section 162 orders appropriate to those circumstances.

¶ 53 The individual respondents deliberately disregarded the most important fundamentals of our system of regulation. Their activities were at the most serious end of the range of misconduct. They inflicted significant harm on investors. They damaged the integrity of our capital markets. They enriched themselves at the expense of the investors, who lost between US$10 million and US$13 million. In these circumstances, we are making orders based on the upper limit – US$13 million. To provide an appropriate deterrent, we have doubled that amount and allocated that total penalty among the respondents in proportion to what we consider their relative culpability.

¶ 54 McLeod was the mastermind, so attracts individual consideration. Fox and Rosiek were equals in the scheme and so should attract identical penalties. Vaughan's role was slightly less central, but his prior conduct offsets any mitigation of penalty for that reason – he must have been aware that what he was doing was wrong.

¶ 55 As noted above, each of the respondents committed hundreds of contraventions, so the penalty we are ordering against each respondent, when calculated based on the number of contraventions, is far smaller than the maximum penalty allowed for each contravention.

¶ 56 The contraventions by Manna Trading, Manna Foundation, Legacy Capital, and Legacy Trust would usually result in a significant administrative penalty. However, in the circumstances of this case, ordering administrative penalties against these entities seems to serve no useful purpose.

¶ 57 Our orders under sections 161(1)(g) and 162 are in Canadian dollars. At the time of this decision, the Canada and US dollars were close to par.

IV Orders

¶ 58 Therefore, considering it to be in the public interest, we order:

McLeod

1. under section 161(1)(b) of the Act, that McLeod cease trading permanently, and is prohibited permanently from purchasing, securities or exchange contracts;

2. under section 161(1)(d)(i), that McLeod resign any position he holds as a director or officer of an issuer, registrant or investment fund manager;

3. under section 161(1)(d)(ii), that McLeod is prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager;

4. under section 161(1)(d)(iii), that McLeod is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;

5. under section 161(1)(d)(iv), that McLeod is prohibited permanently from acting in a management or consultative capacity in connection with activities in the securities market;

6. under section 161(1)(d)(v), that McLeod is prohibited permanently from engaging in investor relations activities;

7. under section 161(1)(g), that McLeod pay to the Commission $16 million, being the amount obtained, directly or indirectly, as a result of his contraventions of the Act;

8. under section 162, that McLeod pay an administrative penalty of $8 million;

Vaughan

9. under section 161(1)(b), that Vaughan cease trading permanently, and is prohibited permanently from purchasing, securities or exchange contracts;

10. under section 161(1)(d)(i), that Vaughan resign any position he holds as a director or officer of an issuer, registrant or investment fund manager;

11. under section 161(1)(d)(ii), that Vaughan is prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager;

12. under section 161(1)(d)(iii), that Vaughan is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;

13. under section 161(1)(d)(iv), that Vaughan is prohibited permanently from acting in a management or consultative capacity in connection with activities in the securities market;

14. under section 161(1)(d)(v), that Vaughan is prohibited permanently from engaging in investor relations activities;

15. under section 161(1)(g), that Vaughan pay to the Commission $16 million, being the amount obtained, directly or indirectly, as a result of his contraventions of the Act;

16. under section 162, that Vaughan pay an administrative penalty of $6 million;

McMordie/Fox

17. under section 161(1)(b), that McMordie, also known as Fox, cease trading permanently, and is prohibited permanently from purchasing, securities or exchange contracts;

18. under section 161(1)(d)(i), that McMordie, also known as Fox, resign any position he holds as a director or officer of an issuer, registrant or investment fund manager;

19. under section 161(1)(d)(ii), that McMordie, also known as Fox, is prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager;

20. under section 161(1)(d)(iii), that McMordie, also known as Fox, is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;

21. under section 161(1)(d)(iv), that McMordie, also known as Fox, is prohibited permanently from acting in a management or consultative capacity in connection with activities in the securities market;

22. under section 161(1)(d)(v), that McMordie, also known as Fox, is prohibited permanently from engaging in investor relations activities;

23. under section 161(1)(g), that McMordie, also known as Fox, pay to the Commission $16 million, being the amount obtained, directly or indirectly, as a result of his contraventions of the Act;

24. under section 162, that McMordie, also known as Fox, pay an administrative penalty of $6 million;

Rosiek

25. under section 161(1)(b), that Rosiek cease trading permanently, and is prohibited permanently from purchasing, securities or exchange contracts;

26. under section 161(1)(d)(i), that Rosiek resign any position she holds as a director or officer of an issuer, registrant or investment fund manager;

27. under section 161(1)(d)(ii), that Rosiek is prohibited permanently from becoming or acting as a director or officer of any issuer, registrant or investment fund manager;

28. under section 161(1)(d)(iii), that Rosiek is prohibited permanently from becoming or acting as a registrant, investment fund manager or promoter;

29. under section 161(1)(d)(iv), that Rosiek is prohibited permanently from acting in a management or consultative capacity in connection with activities in the securities market;

30. under section 161(1)(d)(v), that Rosiek is prohibited permanently from engaging in investor relations activities;

31. under section 161(1)(g), that Rosiek pay to the Commission $16 million, being the amount obtained, directly or indirectly, as a result of her contraventions of the Act;

32. under section 162, that Rosiek pay an administrative penalty of $6 million;

Manna Trading, Manna Foundation, Legacy Capital, Legacy Trust

33. under section 161(1)(b), that Manna Trading, Manna Foundation, Legacy Capital, Legacy Trust cease trading permanently, and are prohibited permanently from purchasing, securities or exchange contracts;

34. under section 161(1)(b), that all persons cease trading permanently, and are prohibited permanently from purchasing, any securities of Manna Trading, Manna Foundation, Legacy Capital, Legacy Trust;

35. under section 161(1)(g), that Manna Trading, Manna Foundation, Legacy Capital, and Legacy Trust each pay to the Commission $16 million, being the amount obtained, directly or indirectly, as a result of their respective contraventions of the Act; and

36. that the aggregate amount paid to the Commission under paragraphs 7, 15, 23, 31, and 35 must not exceed $16 million.

¶ 59 October 22, 2009

For the Commission

Brent W. Aitken
Vice Chair

David J. Smith
Commissioner

Shelley C. Williams
Commissioner